**No.10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING**

[Chapter VIII, Rule 32 (2) (b)]

**Description of Case.**

**Criminal Appeal No.1139 of 2001 (Old No. 3110 of 1983)**

Sunder Lal
Versus
State of Uttar Pradesh

**A.F.R.(Approved for Reporting)**
~~Not Approved for Reporting~~

**(B.S. Verma, J.)** **(Irshad Hussain J.)**

**Date:** August 11, 2005 ***Initials of Judge.***

**THE HIGH COURT OF UTTARANCHA AT NAINITAL.**

Criminal Appeal No. 1139 of 2001
Old No. Criminal Appeal No. 3110 of 1983

Sunder Lal Son of Lachham Ram
Resident of Jhirali, Patwari Circle Bilori,
Tehsil Bageshwar, District Almora.

…..Appellant.

Versus

State of Uttar Pradesh.

…Respondent.

**Sri Abdul Wahid, Adv. learned amicus curaie, for the appellant-accused.**
**Sri H.C.Pande, Learned A.G.A. for the respondent State.**

**Coram: Hon'ble Irshad Hussain, J.**
**Hon'ble B.S.Verma, J.**

**Dated August 11, 2005**

**( Per Hon'ble B.S.Verma, J.)**

This Criminal Appeal is directed against the judgment and order of conviction dated November 28, 1983 passed by the Sessions Judge, Almora, in Sessions Trial No. 32 of 1983, State Vs. Sundar Lal, whereby the accused-appellant has been convicted for the offence punishable under Sections 324 and 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of two years and life imprisonment respectively. Both the sentences were ordered to run concurrently.

Brief facts, giving rise to the present appeal, as emerging from the record are that a report was lodged with the Patwari Bilori by Prakash Chandra (PW2) to the effect that on the fateful day at about 11-30 a.m., his father Dewan Ram (deceased) along with Lachhi Ram injured witness P.W.3 as well as accused-appellant Sundar Lal were travelling by the staff by of Jhiroli factory. When bus stopped near the motor garage Bilori, accused Sundar Lal s/o Lachham Ram stabbed his father as well as Lachham

Ram PW3 by a knife. Witnesses Pram Ram (PW6) and others were present at that time in the bus. His father was taken to the Takula Hospital for treatment. On the basis of the written report dated 21.5.83, the Check F.I.R. dated 21.5.1983 (Ex.Ka-3) was recorded at the Patwari Headquarter Bilori. The case was registered at Crime No. 25/83 at 2-45 p.m. on 21.5.83 under Section 452,324 and 326 I.P.C. The investigation of the case was taken up by Patwari, who recorded the statement of the reporter, PW2, and then along with him, proceeded to the place of occurrence near Almora Magnesite Factory at about 3 p.m. on the same day. Patwari recorded statement of the injured Lachhi Ram. He sent the injured in the company of the reporter to P.H.C. Takula for medical examination and started search of the accused in village Palarichhina. In the way, between the said Factory and Duwalgar, he met Mohan Lal P.W.8, Bishan Ram, Narayan Singh Sabhpati Bilori and few other persons holding and bringing accused Sundar Lal. The accused was handed over to the Patwari along with the recovered property.These witnesses were asked to accompany the Patwari to his headquarter. At the headquarter, the Patwari/Investigating Officer prepared two memos of the recovery (Ex.Ka-4 and Ka-5) in their presence. Patwari also recorded the statements of witnesses Param Ram PW5,Pratap Singh Thapa PW6 and took the search of the accused and prepared search memo Ext.Ka-17 and interrogated him. The Patwari then inspected the staff bus No. URB-5922 at the Factory and found blood stains thereon. He Wiped it with a paper and took sample thereof, Ext. 5 in presence of the witnesses vide memo Ext. Ka-18 and sealed it in a packet. The next day at 7 a.m. Patwari inspected the place of occurrence on the identification of PW6, Pratap Singh Thapa, driver, and prepared a site plan Ext.Ka-19. The Investigating Officer went in search of the alleged ***Chhura*** or ***Chaku***, the weapon of offence, from the place of occurrence to Palarichhina but to no avail. The Patwari sent the accused-appellant along with necessary papers to the Magistrate concerned through Naib Tahsildar

Bageshwar accompanied by his peon Dharam Singh. Search of the weapon of offence was again made and the Patwari proceeded to the place of occurrence on 23.5.83 as well, but the same could not be recovered. Dharam Singh, peon of the Patwari returned in the same evening from Almora and informed Patwari that Dewan Ram died in the District Hospital on 22.5.198. In the meantime, reporter P.W.2 and son of the deceased returned along with the dead body of the deceased and informed the Patwari. A medical certificate of the injuries of the deceased issued on 21.5.1983 at P.H.C. Takula was delivered to Patwari, on the basis of which the case was converted under Section 302 I.P.C. and special report about it was sent.

On 24.5.83, Patwari received sealed bundle from Police Station Almora. On 27.5.1983, witness Har Kishan delivered a bundle of clothes worm by the deceased as well as Lachhi Ram injured at the time of occurrence which included blood stained pink shirt and half-Baniyan of the injured, Exts. 3 and 4 and its memo Ext.Ka-20. The memo Ext.Ka-21 was prepared in respect of the clothes of the deceased. The Patwari then sealed them in a bundle. On 3.6.1983, Patwari recorded the statement of Tara Datt P.W.4 and on 6.6.83, he received the inquest report from Naib Tahsildar Bageshwar. On 17.6.1983, Patwari recorded the statement of witness Mohan Lal PW8 and that of Shyam Singh PW7 on 24.6.83. After completing the investigation, Patwari submitted charge-sheet dated 25.6.1983 (Ext.Ka-22) against the accused-appellant.

It is also borne out from the record that the injured Dewan Ram (deceased) was admitted in the District Hospital Almora at 3.50 p.m. on 22.5.83, who succumbed to his injuries on the same day at 4.50 p.m. The information was given to Police Station Almora, which was recorded in the G.D. Report No. 31 at 18-45 hours on 22.5.1983, the copy whereof is Ext.Ka-6. The Inquest report of the dead body was prepared by the police of P.S. Almora

and relevant papers, namely Panchayatnama, photo Lash, Challan Lash, letter for Post Mortem Examination and sample seal,Exts.Ka-7 to ka-12 respectively. S.I.G.S. Bisht, PW9, sent the dead body in a sealed cover for post mortem examination through constables Behari Lal and Rajendra Lal. He returned to P.S. Almora at 1615 hours on 23.5.1983 the entry to that effect is G.D.R. No. 30, copy whereof is Ext.Ka-14. Since the offence related to Patwari Circle Jhiorli, PW 9 sent the necessary papers to PW 10 B.C. Lohani, Patwari concerned on 24.5.1983 vide entry in G.D.R. (Ext. Ka-15).

The injury reports of the injured Dewan Ram (deceased) and PW 3 Lachhi Ram prepared by Dr. J.C. Durgapal PW1 at the P.H.C.Takula at about 1-30 p.m. on 21.5.1983 are on record as Exts. ka-1 and Ka-2. The Post Mortem of the dead body of the deceased was conducted by Dr. A.P. Agarwal, PW11 at the District Hospital Almora at 1 p.m. on 23.5.83 and the Post Mortem Report thereof is Ext.Ka-24.

The Munsif-Magistrate Almora committed the case to the Court of Sessions as the offences charged were exclusively triable by the Court of Session, where the accused was charged under Section 324 and 302 of the I.P.C. to which the accused pleaded not guilty and claimed to be tried.

During the trial before the Sessions Judge, Almora, prosecution proved documents, Exts. ka-1 to Ka-24 and also tendered in evidence affidavits of witnesses Bhawani Ram, Head Const., Nityanand and Har Kishan Lal, Exts. Ka-25 to Ka-27 respectively. Learned counsel for the accused-appellant made endorsement thereon to the effect “not required for cross examination”. The prosecution proved the case property material Exhibits 1to 8. In oral evidence, prosecution examined P.W.1 Dr. J.C. Durgapal, PW2 Prakash Chandra, PW3 injured Lachhi Ram,

PW4 Tara Datt, PW5 Param Ram, PW.6 Pratap Singh Thapa, the driver of the staff bus, P.W.7 S.I. Shyam Singh, PW8, Mohan Lal, PW9 S.I. G.S. Bisht, PW 10 B.C. Lohani, Patwari Bilori and PW 11 Dr. A.P. Agarwal. Out of these witnesses, PW3 PW5 and PW6 are eye-witnesses of the occurrence.

The statement of the accused was recorded under Section 313 of the Cr.P.C. In his statement, he denied his participation in the crime and alleged his false implication on account of enmity with the family members of the deceased. The accused stated that on 21.5.83 while he was coming from Delhi via Haldwani, he got down at Kafaligair and proceeded to Chhanabilori through path-way, where he took tea at the shop of Dewan Singh. He than proceeded to his house at Jhiroli through ***Pagdandi*** and a little ahead of the shop, Bishan Lal Master and Mohan Lal met him and they asked him to offer them liquor. When the accused-appellant declined to it, Bishan Lal Master hurled ***Lathi*** blow on his head resulting into fracture and he experienced unconsciousness/reeling of mind. Then Bishan Lal took out sum of Rs.1800/- along with coins of Rs. 3 or 4/- as well as clothes from the pocket as well as from the bag of the accused and handed him over to the Patwari Bilori. Accused claimed to have requested the Patwari to lodge his F.I.R. but he refused. He also pleaded that he was medically examined at the P.H.C., Bageshwar, as well as in the District Jail, Almora. The accused-appellant filed papers Ext. Kha-1 to kha-3 and also produced witnesses Dr. N.D. Punetha, D.W.1 and Dr. R.S. Shahi, D.W. 2 in his defence.

The learned Sessions Judge after hearing the learned counsel for both the parties and having perused the entire material on record came to the conclusion that the prosecution has succeeded in bringing home the guilt to the accused-appellant under Section 324

and 302 of the Indian Penal Code and convicted and sentenced him as aforesaid.

We have hared learned counsel/Amicus Curiae appearing for the appellant as well as learned Asst. G.A. for the State and carefully examined the entire material on record including the judgment under appeal

In support of the appeal, it has been contended on behalf of the appellant that the finding and the order of conviction passed against the accused-appellant is not based on evidence on record, therefore, it has been submitted that the order of conviction passed against accused-appellant is liable to be set-aside and the accused may be acquitted of the charges levelled against him.

It is not disputed that the deceased Dewan Ram had died on 21-5-1983. The death of the deceased Dewan Ram is proved from the post mortem examination report dated 23-5-1983 prepared by Dr. A.P. Aggarwal, Medical Officer District Hospital Almora. The post mortem report is available on record as Ext.Ka 24, which has been duly proved by the medical officer PW 11. We have perused the Post Mortem Report, Ext.Ka-24. In this document, it has been mentioned that the post Mortem of the dead body was conducted on 23.5.1983 at 1 p.m. In Ext.Ka-24, the ante mortem injuries found on the person of the deceased were noted by the doctor. In the opinion the of the doctor, the death of the deceased was caused due to shock and hemorrhage as a result of ante mortem injuries. Since the deceased died at 4.50 p.m. on 22.5.1983 in the District Hospital, Almora, therefore, the time and place of death are not disputed. The only question for consideration in this appeal is whether the finding of the Sessions Judge that the deceased was intentionally murdered by the accused-appellant on the date, time

and place as alleged by the prosecution is proved beyond reasonable shadow of doubt.

At the outset, it may be mentioned that in the instant case, two persons sustained injuries-one is the father of the reporter Prakash Chandra, namely, Dewan Ram, who died subsequently during hius treatment is the District Hospital and the other is injured Lachhi Ram P.W. 3. It is also pertinent to mention that the First Information Report was lodged by P.W.2 Prakash Chandra on 21.5.1983 (Ext.Ka-3), when the injured Dewan Ram was shifted to the Primary Health Centre Takula for treatment after the occurrence by the eye witnesses. All the eye witnesses have been named in the written report. F.I.R., Ext Ka-16, was recorded by Patwari Bilori on 21.5.1983 at about 11.30 a.m. and thus the F .I.R. in this case was lodged promptly without inordinate delay. No submission was made regarding delay or otherwise in lodging the F.I.R. on behalf of the accused-appellant before us. Even otherwise, we do not find any reason to disbelieve the veracity of the First Information Report in this case.

The matter regarding factum of murder of Dewan Ram and injuries to PW3 Lachhi Ram was dealt in detail by the learned Sessions Judge in his judgment. The factum of occurrence was proved before the trial court by the prosecution through testimony of three eye-witnesses, namely, Lachhi Ram PW3, Param Ram, P.W.5 and Pratap Singh Thapa, driver, P.W.6. The most important aspect of this case is that the factum of occurrence, the manner of assault and the weapon used for committing the crime as stated to by the eye-witnesses of the occurrence have been fully corroborated by the medical evidence on record. The occurrence took place in the staff-bus near the motor garage at Bilori on the fateful day, when the accused-appellant stabbed the deceased. Relevant portion of the statements of the eye-witnesses is necessary to be mentioned herein

for just decision of the case. Lacchi Ram PW3 in his testimony before the trial court stated that he knew the accused Sundar Lal from before and both of them belong to the same village Jhiroli. Deceased Dewan Ram was his real uncle. He stated that accused Sundar Lal and family members bore grudge against their family due to land dispute and the accused side started grabbing their land and on being resisted not to do so, they became annoyed. PW3 further stated that on 21.5.1983, he accompanied by Dewan Ram,Tara Datt, (P.W.4), Param Ram (P.W.5) and others were going by the factory staff bus to Jhiroli, which was then driven by driver Thapa. As soon as the staff bus reached the crossing at the factory, the accused and others persons boarded the vehicle. Sundar Lal accused sat by his side on the seat opposite to the driver seat. Dewan Ram was sitting behind the driver.Thereafter, the staff bus started towards mines site and when it reached Chhauna garge, the driver stopped the vehicle and went to a tea shop. Sundar Lal accused told him (the injured) that he had come to meet him from so distant a place. Ludkily he met him there and the accused also told him that he had spoiled his family life. The injured replied that as to why he was insulting him in presence of so many persons and as to who had told him so. On this Sundar Lal accused said *"I had seen you"*and then he took out a knife from the pocket of his pant and by the other hand he caught hold of his neck. When the accused started to give knife blow to him, he bent down to ward off the blow, but still the knife touched his left shoulder injuring his left hand finger. He raised hue and cry. Thereupon,there was scuffle inside the bus and Dewan Ram shouted to caught hold of the accused in order to protect the said victim. when Dewan Ram came towards him, then Sundar Lal accused stabbed him with knife. On this, Dewan Ram fell and rolled down at the entrance door of the bus. The accused thereafter ran away from there by the window/door near the seat of the driver saying that he now stand satisfied. This statement of the P.W.3 was recorded at page 1 to 4 of his lengthy examination in chief. He was cross-

examined at length by the learned counsel for the accused-appellant. In his cross-examination, this witness admitted enmity with the family members of the accused. He clearly stated that prior to this occurrence, there was no instance of enmity between the rival parties. He however denied that he had no concern with the wife of the accused, who died one year ago. P.W.3 further stated that the accused asked about his wife when he sat inside the staff bus. He admitted that the accused had returned after about one year from Delhi.

The other eye-witness of the occurrence is PW 5, Param Ram, who is resident of village Jhiroli. He stated that accused Sundar Lal and he belong to the same village and that he knew deceased Dewan Ram and injured Lacchi Ram from before. In his testimony, he corroborated the date, time and place of occurrence. Regarding manner of occurrence, he gave ocular account of the same by stating that although he did not know as to what talks were going on between accused and Lacchi Ram PW 3, the accused Sundar Lal stabbed Lacchi Ram by knife. He further stated that when Lacchi Ram shouted and raised hue and cry, deceased Dewan Ram came for his rescue. Then the accused gave knife blow to the deceased, who fell down on the spot. After this occurrence, out of fear he jumped out from driver side window along with his wife and he did not return to board the staff bus again. In his cross-examination, he admitted distant relationship with the family of the injured. P.W.3.

P.W.4, Tara Dutt, was also one of the occupants of the staff bus. He knew the deceased and injured from before and recognized the accused Sundar Lal from the date and time of occurrence. At the time of occurrence, according to this witness, he had gone to the Bilori Post Office for bringing postal stationery envelope, etc. By the time, he returned, the actual occurrence of stabbing was over. He saw that blood was oozing from wound of

injured Lacchi Ram and Dewan Ram lying in a Nali (small channel), who was shouting that his rib had fractured. He also saw the accused going towards Palari Chhina through District Board path-way. This witness testified that Lacchi Ram and accused Sundar Lal were sitting side by side on the horizontal seat opposite to the seat of the driver in the staff bus.

P.W.6, Pratap Singh Thapa, is the driver of the staff bus in question. About factum of murder, he stated that at that time, he had gone to a tea-shop. In the meantime, he heard hue and cry in the staff bus. He went there and found the deceased Dewan Ram in an injured condition at the door-step of the staff bus as well as injured Lacchi Ram, PW3, having sustained injuries. He further stated that one person was going on the pathway leading to Bageshwar having blood-stained knife and a bag. He further stated that the said person was the same who boarded the staff bus outside the factory and sat by the side of injured Lacchi Ram.

From the above narration of relevant portion of the testimony of the eye-witnesses, it clearly comes out that an altercation took place between the accused Sundar Lal and PW 3 injured Lacchi Ram regarding alleged illicit relation of P.W.3 with the deceased wife of the accused when she was alive. P.W.3 Lacchi Ram, as mentioned above, stated in unequivocal terms that the accused-appellant took out knife from his pocket and intended to kill him. According to him, he (P.W.3) escaped the fatal knife blow given by the accused and he raised hue and cry to save himself. On hearing the alarm, Dewan Ram, who was uncle of the injured, came forward from his seat. when Dewan Ram intervened, the accused gave knife blow to this intervener.

we may here mention that the factum of occurrence is fully corroborated by medical evidence on record. The injuries of

Dewan Ram (deceased) were examined at 1.30 p.m. on 21.5.1983 at P.H.C. Takula by PW 1 Dr. J.C.Durgpal, who prepared injury report Ext.ka-1 A perusal of Ext. Ka-1 goes to show that the injured Dewan Ram, who was aged about 45 years, sustained incised wound 2" x ½" x muscle deep over the left side of chest longitudinally. There was fresh bleeding oozing from the wound. The wound was spindle shaped. In the opinion of the doctor, the injured was caused by some sharp instrument and duration of injury was less than one day. The doctor had found the patient in semi- conscious state and unable to take normal respiration, therefore, the doctor made an endorsement on the injury report to the effect "Patient is referred to Distt. Hospital Almora for further treatment." Subsequently, after the death of Dewan Ram in the District Hospital Almora, autopsy of the dead body was conducted by P.W.11 Dr. A.P. Agarwal, who prepared the Post Mortem Report, Ext.ka-24. A perusal of the Post mortem Examination Report shows that the deceased was found to have punctured wound 2cm x 0.5 cm x 3 cm (chest cavity deep) vertical on left side of chest at mid auxiliary line 10 cm. Below left axilla directed downwards and backwards, cutting the 5$^{th}$ intercostal muscles and the wound was having clean cut edges which were slightly curved to each other. Pleura was found cut, left lung shrunken and the cavity contained 2 pints of liquid blood. Both the chambers of heart were empty. The deceased died in the District Hospital Almora at 4.50 p.m. on 22.5.83. In the opinion of the doctor, the death was caused due to shock and haemorrhage as a result of the aforesaid ante-mortem injury, and the same was sufficient in the ordinary course of nature to cause death.

The injuries of the injured P.W.3 were also examined the same day at 4 p.m. in P.H.C. Takula, District Almora, vide injury report Ext.ka-2. The doctor found (1) an incised wound 2" x ½" x spindle shape present over the inner aspect of left upper arm and (2) an abrasion ½" x ¼" over the left index finger. In the opinion of the

doctor, the injury no.1 was caused by some sharp instrument and injury no.2 by some hard substance. The duration of injuries was less than one day.

From the above narration of the oral testimony of the eye-witnesses including the injured P.W.3 coupled with the medical evidence on record, it is evident that Dewan Ram, deceased, suffered fatal knife blow upon a vital part of his body, which was sufficient to cause his death and that it had in fact caused his death. It is further established from the medical evidence on record that PW 3 sustained injuries in the occurrence, which is corroborated on all material points by the testimony of injured Lacchi Ram as well as eye witnesses Tara Datt, P.W.4, Param Ram, P.W. 5 and Pratap Singh Thapa, P.W.6. The learned Sessions Judge has elaborately dealt with the evidence of all the witnesses including the eye witnesses in his judgment and impugned order. We do not feel it necessary to reiterate the same in much detail and only the relevant portions or their testimony detailed earlier is sufficient for just decision of the appeal.

Learned Amicus Curiae for the accused-appellant vehemently submitted that in the injury report of the deceased Dewan Ram, Ext.ka-1, prepared by Dr. J.C.Durgapal, PW 1 the incised wound was found to be spindle shape over the left side of the chest. This injury could not have been caused by a knife or *Chhura*, therefore, the accused cannot be held guilty for the crime as alleged by the prosecution. This submission is misconceived. The doctor PW 1 also found the injury of the injured eye witness Lacchi Ram PW 3 vide injury report Ext.Ka-2 and the PW 1 has clearly stated in his testimony that the injury no. 1 of both the injured could have been caused by Chhura or knife. It is interesting to note that no suggestion was put to the Medical Officer, PW 1, with respect of spindle shape injury on the person of the injured whether the same

could have been caused by Chhura. It is true that the weapon of assault was not produced before the court below. The record shows that the Investigating Officer PW 10 made efforts for search of the Chhura but the same could not be recovered. But the same is not fatal to the case of prosecution, in view of the Apex Court Judgment in the case of ***Anwarul Haq V. The State of Uttar Pradesh [Judgment Today 2005 (5) S.C. Page 9]***, wherein it was held in para 15 that *"Eye witnesses in the present case have described the knife, and merely because the knife has not been recovered during investigation same cannot be a factor to discard the evidence of PWs. 1 & 2. Wounds noticed by Doctor's (PW-3) also throw considerable light in this aspect. Doctor's opinion about the weapon the weapon, though theoretical, cannot be totally wiped out."* We may also mention that in the Post Mortem Report PW 11 Dr. A.P. Agarwal found punctured wound on the person of the deceased at the time of autopsy. We have carefully gone through the testimony of PW 1, Dr. J.C. Durgapal, as PW 11. None of these doctors was suggested as to how the punctured wound is connected with that of spindle shape wound. Moreover, the learned Sessions Judge elaborately dealt this point in paragraph 17 of the impugned judgment. Even in the Medical Jurisprudence and Toxicology, it is mentioned that incised wound may be caused by a knife as well as stab wounds or punctured wounds may also be caused by knife. For want of specific suggestion on the point to the doctors PW 1 and PW 11 no doubt can be cast on the veracity of the ocular account on record supported by medical evidence. The argument of the learned Amicus Curiae is not at all tenable in the facts and the circumstances of the case.

Learned counsel/Amicus Curaie for the accused-appellant assailed the impugned judgment and order of conviction mainly on the ground that the accused took the defence in his statement under Section 313 Cr. P.C. that on the fateful day, he came

from Delhi by bus. He alighted from the bus at Kafaligair and then started to Chhauna Bilolri Through Matela path-way. There at the shop of Diwan Singh, he took tea and thereafter proceed for his village Jhiroli. A little ahead of the shop, Bishan Lal Mater and Mohan Lal met him. Bishan Lal asked him to offer liquor but he declined. On this Bishan Lal Master hurled Lathi blow on his head with the result he sustained injury and he found his head reeling. According to the accused, he had amount of Rs. 1,800/- in the pocket of his pant and few coins in the upper pocket of his shirt. All that was took out by Bishan Lal Master including clothes kept inside his bag. He was also handed over to the custody of Patwari Bilori. The accused requested the Patwari to lodge his report, but he refused. He was brought to government hospital at Bageshwar by the Patwari. He also pleaded that his injuries were examined in the District Hospital, Almora. This is all the assertions made by the accused-appellant in the last question of this statement under Section 313 Cr.P.C. In his defence, the accused has produced two doctors, namely, D.W.1 Dr. N.D. Punetha Medical Officer, P.H.C. Bageshwar and D.W.2 Dr. R.S.Shahi, A.M.O. District Jail, Almora. D.W. 1 proved the injury report, Ext.kha-1. We have perused the injury report. The doctor stated that the injuries were simple and the same could have been caused by Lathi Blow. In his opinion, the injuries could have been caused at the relevant time. D.W.1 in the last line of his statement clearly admitted the suggestion that the injuries sustained by the accused could be self-inflicted/manufactured in case the person so desired. the testimony of D.W.2 is not very material for the decision of appeal. On the strength of defence evidence, the learned counsel for the accused-appellant submitted that in fact the accused suffered injuries in another incident at the relevant time, therefore, he cannot be held responsible for the death of the deceased Dewan Ram or for the injuries of P.W.3 in the alleged occurrence. In the alternative, the learned counsel for the accused-appellant submitted that it was fit case in which the accused at the most could

have been convicted under Section 304, Part II of the Indian Penal Code instead of Section 302 of the I.P.C.

We have examined the statement of Patwari Bilori in order to test the veracity of the defence version. Bhuwan Chandra Lohani, Patwari Bilori has been produced as P.W.10. In his cross-examination, at para no. 27, he denied the defence suggestion that when the accused Sundar Lal was produced before him, there was blood oozing from the forehead of the accused or that he was having any injury on his person. In para No. 28, the Patwari further denied the suggestion that accused Sundarlal told him that he was beaten and looted by Master Bishan Lal and his associates. He also denied that accused asked him to lodge his report or that he refused to his request.

Having carefully examined the entire defence version on record vis-à-vis positive and trustworthy evidence of the witnesses including the eye-witnesses, we are not inclined to accept the defence version that the accused-appellant was not responsible for the fatal assault on the person of the deceased Dewan Ram and injuries to P.W.3. we hold that the accused-appellant was involved in the occurrence and he was person who stabbed the deceased by knife when the deceased came forward to the rescue of the P.W.3 Lacchi Ram.

Now, there remains to be examined whether the accused-appellant intentionally stabbed the deceased, and the injury was caused with knowledge that the death will be the inevitable result of the assault.

Learned Amicus Curiae for the accused-appellant in support of his contention referred to the decision of the Apex Court in the case of ***Madhusudan Satpathy and others Vs. State of Orissa***

***(AIR 1994, Supreme Court, Page 474)*** *has been relied upon by the learned counsel for the accused-appellant wherein it was held that "* ***Penal Code (45 of 1860), Ss. 304, Parts I and II, 299 - Culpable homicide-Alteration and reduction of sentence-Accused causing death of deceased in a scuffle-Conviction by High Court under S. 304, Part I with sentence of 6 years' rigorous imprisonment-Medical evidence showing only one fatal injury on head of deceased, other injuries found simple-No deadly weapons used-Held, accused had only knowledge that injuries inflicted by them were likely to cause death and had no intention to cause death-Conviction altered to S. 304, Part II and sentence of imprisonment reduced to 3 years' rigorous imprisonment."***

While narrating the relevant portions of the statements of eye-witnesses especially the own testimony of P.W.3, we found that he scuffle started between the accused and the injured witness Lachhi Ram. P.W.3 has in unequivocal words stated that the intention of the accused was to finish him and as is evident from the prosecution evidence, the accused occupied the seat by the side of the inured P.W.3 in the staff car. It is also clear from the record that the accused first told the injured P.W.3 that he spoiled his family life and the accused had come from such a distant place to see him. Then, furiously, the accused tried to give fatal knife blow to the injured P.W.3, but he fortunately did not receive fatal blow. P.W.3 raised hue and cry for his safety. On this, deceased Dewan Ram who was sitting behind the seat of the driver came forward and intervened in the matter. It was only then, that accused did give knife blow to the deceased. From a perusal of the entire material produced by the prosecution, we do not find an iota of evidence so as to lead us to hold that the intention of the accused was to commit murder of deceased Dewan Ram, particularly when the accused-appellant having been annoyed with injured Lachhi Ram PW3 took out the knife from his pocket and tried to stab him in order to cause fatal

assault which the injured escaped by saving his neck. It is established on record that the deceased Dewan Ram suffered knife blow only when he came forward to rescue his nephew, PW3, Lacchi Ram raised an alarm. We have perused the F.I.R. Motive behind the murder was not set up by the son of the deceased PW 2 Prakash Chandra. We fail to understand as to why the learned Sessions Judge overstepped in holding the accused-appellant guilty for the offence of murder particularly when the ocular testimony of P.W.3 throws full light on the factum of occurrence. Even in the impugned judgment, the learned counsel for the defence submitted the accused had no intention or knowledge at all that the injury caused to Dewan could prove fatal and that on the spur of moment without premeditation, in a heated atmosphere, the knife blow was inflicted on the person of the deceased. We have no hesitation in holding that the learned Sessions Judge fell in error in convicting the accused for the offence punishable under Section 302 of the I.P.C. instead of Section 304 Part II of the I.P.C. The record reveals that the attack by the accused on the person of Dewan Ram could not be said to be pre-mediated. Accordingly, we hold that it is a fit case in which the accused-appellant is liable to be convicted for the offence punishable under Section 304 Part II of the I.P.C. instead of Section 302 of the I.P.C. we are fortified in our view by the verdict of the Apex Court in the case of ***"Dattu Shamrao Valake and another vs. State of Maharashtra (AIR 2005 Supreme Court page no.2331)*** *wherein it was held* ***(B) Penal Code (45 of 1860), Ss. 300, Exception 4, 304, part II-Murder-Appreciation of evidence-There appears to be sudden provocation followed by free fight between parties-It was not possible to say who initiated it-It lasted for only few minutes resulting in death of two persons of prosecution party-Attack by accused could not be said to be pre-mediated-Accused No.1 had fired shots only in air and not on deceased- He had thereafter picked up axe and dealt blow on neck of neck of deceased No. 1 who was an old an and succumbed to injures- From his conduct and***

***manner of attack on old person it would be reasonable to infer that he was having knowledge that said act was likely to cause death but he had no intention to cause death-Therefore, his conviction under S. 304, Part-II and sentenced to 5 years' R.I. and fine."***

Here we may also refer to the verdict of the Apex Court in the case of ***Ramesh Vithalrao Thakre and another Vs. State of Maharshtra [1995 CRI.L.J. 2907 = AIR 1995 Supreme Court, page 1453]*** *wherein it was held that* ***"Penal Code (45 of 1860), Sc. 301, 304, Part2-Intention-Deceased getting single blow by knife in abdomen by accused while intervening to save her brother being attacked by accused-Accused not causing any other injury to deceased-Accused can be clothed with knowledge and not intention that the injury was likely to cause death-Offence would fall under S. 304 Part II and not S.300."*** The facts of the case before us are similar because here also the deceased Dewan Ram suffered only one injury and the assault by the accused-appellant on his person was not premeditated. The deceased only intervened in the scuffle, therefore, the case of Ramesh Vithalrao Thakre and another (supra) is fully applicable in the instant case.

So far as the conviction of the accused-appellant under Section 324 I.P.C. is concerned, we are of the opinion that the learned Sessions Judge committed no error in holding the accused-appellant guilty for the offence under Section 324 I.P.C. in respect of the injuries caused to P.W.3 Lacchi Ram (injured).

However, in view of the discussion aforementioned, it is held that the prosecution has been successful in bringing home the guilt to the accused beyond shadow of reasonable doubt for the offence of culpable homicide not amounting to murder punishable under Section 304 Part-II IPC for causing the death of Dewan Ram

deceased. The sentence of R.I. for ten years will meet the ends of justice.

For the reasons aforesaid, the appeal partly succeeds.

The accused Sundar Lal is accordingly convicted for the offence under Section 304 Part II of the Indian Penal Code instead of Section 302 I.P.C. and is sentenced to undergo ten years' R.I. under this count. the conviction of the accused and the sentence of two years' R.I. under Section 324 I.P.C. is upheld. Both the sentences shall run concurrently. The judgment dated 28-11-1983 passed in Sessions Trail No. 32 of 1983 is modified to the above extent.

The accused-appellant was granted bail by the High Court in the year 1984. He is absconding. Processes to procure his attendance were initiated under Chapter XXXIII of the Cr.P.C. One of the sureties, namely Akbar Ali was sent to civil prison, while the other surety Anand Singh had deposited the forfeited bail amount in the court of C.J.M. Almora. The accused shall be taken into custody to serve out the sentence awarded to him.

The record be sent back to the court concerned for compliance to be reported to this Court in two months.

**(B.S.Verma, J.)** **(Irshad Hussain, J.)**

RCP

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